Office - Supreme Court,
FILED
JUL 19 1954
HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. ...222

HOWARD R. BENSON and ROBERT H. BENSON, Doing Business as BENSON SCAFFOLD MANUFACTURING COMPANY,
Petitioners,

v.

A. F. HUTTO and NEWARK INSURANCE COMPANY.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Sixth Judicial Circuit.

H. H. McCAMPBELL, JR.,
Burwell Building,
Knoxville 2, Tennessee,
Attorney for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	4
Reasons for granting the writ	5
Appendix	11
Appendix to brief of appellant Hutto in United States Court of Appeals for Sixth Circuit.....follows	12
Proceedings in the United States Court of Appeals for the Sixth Circuit:	
Causes argued and submitted	13
Judgment in case No. 11,873	13
Judgment in case No. 11,874	13
Opinion	14

Cases Cited.

Albert v. Sherman, 167 Tenn. 133	8
Cauley v. Massengill, 35 F. Supp. 371	5
Goodal Co. v. Sartin, 141 F. 2d 427	8
McDaniel v. Mulvihill, 263 S. W. 2d 759 (Dec. 13, 1953)	6
Wells v. Simonds Abrasive Co., 345 U. S. 514, 97 L. Ed. 1211 (May 18, 1953)	6

Statutes Cited.

Article 5526, Vernon's Texas Statutes..... 12
Article 8307, Section 6 (a), Vernon's Texas Statutes.. 11
Section 1254 (1) of the Judicial Code..... 2
Tennessee Code, Sections 8236 and 8595..... 7
Tennessee Code, Section 8592..... 11
Williams' Annotated Code of Tennessee, Section 8595.7, 11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. .....

HOWARD R. BENSON and ROBERT H. BENSON, Doing Business as BENSON SCAFFOLD MANUFACTURING COMPANY,
Petitioners,

v.

A. F. HUTTO and NEWARK INSURANCE COMPANY.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Sixth Judicial Circuit.

The above named petitioners pray that a writ of certiorari issue to review the judgment entered in this case on April 30, 1954, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion of the District Court of the United States, Eastern District of Tennessee, Northern Division, is reported at 110 F. Supp. 355.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 212 F. 2d 349.

JURISDICTION.

(i) The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on April 30, 1954.

(ii) The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code.

QUESTIONS PRESENTED.

1. Whether the Tennessee one-year statute of limitations applies to an action brought in the District Court in Tennessee by a person injured in Texas by reason of an alleged defect in a scaffold, alleged to have been negligently manufactured in Tennessee by the Tennessee defendants, where at the time of the injury in Texas the injured party had the right to proceed under the Workmen's Compensation Law of Texas, or at common law against the Tennessee defendants, and chose first to avail himself of the rights granted by the Texas Workmen's Compensation Law in full before availing himself of the further right to proceed at common law in Tennessee, and in the meantime the Tennessee statute of limitations governing suits for personal injuries at common law had expired.

2. Whether an insurance carrier who has paid Workmen's Compensation benefits under the Texas Workmen's Compensation Statute can avail itself of the right of subrogation against the alleged negligent third party where and when the employee paid by the insurance carrier and the insurance carrier did not file suit against the third party in Tennessee within the one-year period provided by the Tennessee statute of limitations, and where such insurance carrier did not seek to intervene within such period.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the appendix attached hereto.

STATEMENT.

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in said causes by a divided court on April 30, 1954, reversing the decision of the District Court of the United States for the Eastern District of Tennessee, Northern Division, rendered on February 3, 1953.

The original action was filed on August 20, 1952, in said District Court, in which the original plaintiff, A. F. Hutto, a citizen of Texas, sought to recover from the original defendants, citizens of Tennessee, damages for personal injuries in the amount of One Hundred Thousand ($100,000.00) Dollars. Such personal injuries had been received in Texas on August 13, 1951, and the original plaintiff Hutto was granted an award by the Industrial Accident Commission of the State of Texas, which was paid by the Newark Insurance Company, the insurance carrier, under the Workmen's Compensation Act of Texas. The amount of the award in Texas was $5,079.65. Subsequently the insurance carrier sought to intervene in the action originally filed by the said plaintiff Hutto against the defendants.

On September 6, 1952, the defendants filed a motion to dismiss the action on the ground that the Tennessee one-year statute of limitations had run. On November 24, 1952, the insurance carrier filed its motion to intervene. On December 10, 1952, the original plaintiff moved to amend the original complaint by inserting the allegations concerning the proceedings had before the Industrial Accident Commission in Texas under the Texas Workmen's Compensation Act.

On February 3, 1953, the District Judge, Robert L. Taylor, filed a memorandum opinion in which he sustained defendants' motion to dismiss, denied Hutto's motion to

amend the complaint, and denied the motion of the insurance carrier to intervene, on the ground that the Tennessee one-year statute of limitations applied and had run, and that the cause of action accrued at the time of the accident in which Hutto received his injuries, on August 13, 1951.

On February 17, 1953, an order was entered upon said memorandum opinion, dismissing the plaintiff's action. Thereafter the plaintiff and the insurance carrier appealed to the United States Court of Appeals for the Sixth Circuit in due course, and after hearing, decision was rendered on April 30, 1954, reversing the decision of District Judge Taylor and remanding the case to the District Court for further proceedings.

SPECIFICATION OF ERRORS TO BE URGED.

The majority of the Court of Appeals erred:

1. In holding that the right of the injured employee did not accrue against the alleged third party tort-feasor until November 29, 1951, when the insurance carrier under the Workmen's Compensation Law of Texas assumed liability for compensation or paid such compensation.

2. In holding that the cause of action of the plaintiff employee did not accrue on the date of the accident and injury as has been repeatedly held by the appellate courts in Tennessee.

3. In holding that the decisions of the Texas courts govern the running of the statute of limitations in Tennessee.

4. In holding that the statute of limitations of Tennessee is suspended by the operation of the Workmen's Compensation Act of Texas.

5. In holding that the running of the statute of limitations of Tennessee is not a procedural matter and is not governed by the law of the forum.

6. In holding that the decisions of the Texas courts holding that the Texas Workmen's Compensation Act and the procedures provided for its enforcement, suspend or toll the running of the statute of limitations in Tennessee.

7. In reversing the decision of the District Court.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Sixth Circuit has decided in these two cases important state questions in a manner in conflict with the law of Tennessee. It has long been the law of Tennessee, and of other states, that the statutes of limitations of the forum apply and not that of the state where the cause of action arose. A modification of this doctrine by decisions of the Court of Appeals for the Sixth Circuit was for a time recognized by the State of Tennessee where a statute of the foreign state created a new cause of action not known at common law and fixed a period of limitation within which such cause of action might be enforced within the statute itself.

In the case of **Cauley v. Massengill, 35 F. Supp. 371**, filed in the District Court of the United States for the Eastern District of Tennessee, Northern Division, the action was for wrongful death of decedent in Florida between one and two years before commencement of the action. Florida had a two-year period of limitation in its wrongful death statute, whereas, Tennessee had just a one-year period of limitation in its statute. The District Judge, then the Honorable George Taylor, held the Tennessee statute applied. In doing so he said (p. 373):

> "Statutes of limitations being designed according to the sound policy of each state for itself, to put at rest litigation after the lapse of certain varying periods of time, cannot be extended by the legislatures of foreign states . . ."

Judge Taylor expressed the opinion then that the Tennessee Supreme Court had settled the law in that state in these words:

> "While the precise factual situation here involved has not been directly passed upon by the Supreme Court in Tennessee . . . the reasoning and authorities cited indicate the disposition that would be made of the question now before the Court."

Upon appeal, however, the Court of Appeals for the Sixth Circuit reversed this opinion of Judge Taylor and held that the foreign statute creating a new right of action and containing a limitation within itself would prevail over the limitation of the forum.

The recent decision of the United States Supreme Court in the case of **Wells v. Simonds Abrasive Co., 345 U. S. 514, 97 L. Ed. 1211 (May 18, 1953)**, has clearly (as admitted in both the majority and minority opinions in this case in the Circuit Court) destroyed the authority of the decision reversing the District Judge in the case of Cauley v. Massengill. The authority of the original Taylor decision has been restored.

The Wells decision is that the states are free to adopt such rules of conflict of laws as they choose and that the full faith and credit clause of the Federal Constitution does not compel the forum state to use or adopt the period of limitations of the foreign state. This rule applies irrespective of whether the foreign right was known to the common law or arises under a foreign statute creating a new cause of action not known to the common law and setting up within its enactment a period of time within which the new right might be enforced. Tennessee has adopted the policy, approved by the United States Supreme Court, which is expressed in the very recent case of **McDaniel v. Mulvihill, 263 S. W. 2d 759 (Dec. 13, 1953).**

In that case McDaniel was killed by an automobile driven by Mulvihill at a time when both were residents of the State of Mississippi, in which said state the accident occured. In December, 1950, Mulvihill moved to Hamilton County, Tennessee. In June of 1952, the administratrix of McDaniel's estate brought suit in the Tennessee Circuit Court of Hamilton County. The Mississippi statute creating the right of action for wrongful death did not contain, within its enactment, a period of limitation within which it might be enforced. The general statute of limitations applicable in Mississippi is six years. Under the Tennessee law, Code Sections 8236 and 8595, the period of time within which actions might be maintained for injury or death, is limited to one year. Accordingly, the Tennessee Supreme Court held that the Tennessee statute of one year applied. There is no doubt that under the freedom to adopt rules of conflict, as the Wells case vouchsafes to the states, Tennessee does and will continue to choose and apply the period of limitation of the forum.

Thus, the United States Court of Appeals for the Sixth Circuit has decided an important question affecting the public policy of Tennessee in a way that is in conflict with its statutes and decisions.

In another respect, also, is such decision in conflict with long established state law:

> "The cause of action for personal injury accrues at the time of the injury and is the same whether brought by the party injured or by his personal representative. The statute begins to run from the moment of the injury and is not suspended by the death of the injured party."

This quotation is found in a note under Section 8595 of Williams' Annotated Code of Tennessee, citing numerous Tennessee cases in support thereof.

The Court of Appeals for the Sixth Circuit states the Tennessee rule quite well in the case of **Goodal Co. v. Sartin, 141 F. 2d 427**, where it says:

> "True it is, the statute of limitations runs against a cause of action from the time of the original injury and not from the date of the ensuant damages."

In support of this statement the Court cited a number of Tennessee cases, among them **Albert v. Sherman, 167 Tenn. 133**, which goes so far as to hold that in an action against a dentist for negligent extraction of a tooth the statute of limitations began to run at the time of extraction and not at the time the patient suffered damage some one and one-half years later.

In the decision sought to be reviewed, the majority held that the cause of action accrued not at the time of the accident but at the time "the insurance carrier assumed liability for compensation or has paid such compensation" which was several months after the accident and injury. The basis for such a holding is that the Texas courts have held that a claim for compensation under the Texas Workmen's Compensation Act not only tolls or suspends the Texas statute of limitations on third party actions, but also tolls the Tennessee statute of limitations. But it should be observed that such Texas courts do not contend or claim that their decisions govern the Tennessee courts in their decisions and even if they did so claim, the Tennessee courts would not be bound by such holdings. In other words, neither foreign legislative enactments nor foreign court decisions construing them are binding upon other states unless such other states choose to be so bound.

We are not disposed to quarrel with Texas about the exercise of its legislative or judicial powers and procedures, but we do question its right to control Tennessee's sound policy "to put at rest litigation" in its own courts.

This brings us to the conclusion that the decision of said Circuit Court herein is in such substantial conflict with Tennessee law and with the decisions of this Supreme Court that the ends of justice would be served by granting the writ of certiorari herein prayed for. It is further the belief of these defendants that the same or similar situation applies in most, if not in all, of the forty-eight states of the Union and that a sound national policy consistent with the decision of this Supreme Court in the case of Wells v. Simonds Abrasive Co. should be established.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

H. H. McCAMPBELL, JR.,
Attorney for Petitioners.

APPENDIX.

1. Section 8592 of the Code of Tennessee is as follows:

8592 4466 (2769). Actions to be commenced within the time limited.—All civil actions, other than those for causes embraced in the preceding article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided.

2. Section 8595 of the Code of Tennessee is as follows:

8595 4469 (2772). One year for libel, personal injuries, etc.—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statutory penalties, within one year after cause of action accrued.

3. Article 8307, Section 6 (a), of Vernon's Texas Statutes is as follows:

Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the association for compensation under this law, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under this law. If compensation be claimed under this law by the injured employee or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employee in so far as may be necessary and may enforce in the name of the injured employee or of his legal beneficiaries or in its own name and for the

joint use and benefit of said employee or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employee or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employee or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employee or his beneficiaries and the approval of the board, upon a hearing thereof.

4. Article 5526 of Vernon's Texas Statutes reads as follows:

Article 5526. Actions to be commenced in two years • • • There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

6. Action for injury to the person of another.

APPENDIX TO BRIEF OF APPELLANT HUTTO IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TABLE OF CONTENTS OF APPENDIX.

(Attached.)

	Page
Docket entries	1a
Complaint (Aug. 20, 1952)	3a
Motion to dismiss (Sept. 6, 1952)	5a
Motion of Newark Insurance Company to intervene as plaintiff	5a
Intervening complaint	6a
Motion to amend complant (Dec. 10, 1952)	10a
Memorandum opinion of Taylor, D. J. (Feb. 3, 1953)	12a
Order dismissing action at plaintiff's costs (Feb. 17, 1953)	16a
Notice of appeal of A. F. Hutto (Feb. 18, 1953)	17a
Cost bond of A. F. Hutto (Feb. 18, 1953)	17a
Notice of appeal of Newark Insurance Co. (Mar. 13, 1953)	19a
Cost bond of Newark Insurance Company (Mar. 13, 1953)	19a
Order making certain exhibits a part of the record (Mar. 13, 1953)	20a
Claim for compensation for injury filed by A. F. Hutto, claimant, with the Industrial Accident Board, State of Texas (Sept. 19, 1951)	21a
Notice by A. F. Hutto, claimant, of demand for lump sum settlement of compensation claim filed with the Industrial Accident Board, State of Texas (Sept. 28, 1951)	24a

Medical report of Dr. Jack E. Maxfield (Oct. 20, 1951) 25a

Notice of appeal to a court of competent jurisdiction by A. F. Hutto, claimant, filed with the Industrial Accident Board, State of Texas (Oct. 23, 1951) 27a

Copy of Senate Bill No. 237, Section 6-A, as passed by the Thirty-fifth Legislature of the State of Texas, commonly referred to as the "Third Party Action" Statute 28a

Docket Entries

Civil Action No. 2010.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION.

A. F. HUTTO,
Plaintiff,

vs.

HOWARD R. BENSON and ROBERT H. BENSON, d. b. a. BENSON CABLE SCAFFOLD MANUFACTURING CO.,
Defendants.

DOCKET ENTRIES.

Aug. 20, 1952. Complaint filed.

Aug. 20, 1952. Summons for two defendants Knox County issued and handed U. S. Marshal.

Aug. 22, 1952. Summons returned, personally served on Howard R. Benson and Robert H. Benson on August 20, 1952, by leaving copy of complaint and summons. Filed.

Sept. 6, 1952. Motion to dismiss filed. Copy served by attorney.

Sept. 6, 1952. Memo Brief in support of Motion to Dismiss the Complaint, filed. Copy served by attorney.

Sept. 12, 1952. Memo Brief resisting motion complaint, filed. Copy served by attorney.

Nov. 24, 1952. Motion of Newark Insurance Company to intervene as plaintiff, filed.

Docket Entries

Dec. 1, 1952. Brief of Newark Insurance Company in support of its motion to be permitted to intervene as a party plaintiff, filed. Copies served by Counsel.

Dec. 2, 1952. Motion of Newark Insurance Company to Intervene as Plaintiff and Motion to Dismiss heard and taken under advisement. Plaintiff is allowed ten days to file brief and defendants are allowed twenty days for filing reply brief, entered in Civil Order Book 9, page 600.

Dec. 10, 1952. Motion to Amend Complaint, filed.

Dec. 10, 1952. Memorandum Brief supporting Motion to Amend, relating back thereof, and resisting Motion to Dismiss, filed. Copy served by Counsel.

Jan. 8, 1953. Memorandum brief in behalf of Defendants in opposition to Plaintiff's Motion to Amend, filed.

Jan. 9, 1953. Memo Brief of Newark Insurance Company in support of Motion to Amend filed by original plaintiff, filed. Copies served by attorney.

Feb. 3, 1953. Memorandum Opinion of Taylor, D. J., that plaintiff's suit is barred by the Tennessee one-year statute of limitations; the Motion to Amend the Complaint should be denied because the proposed amendment would not affect the outcome; the motion to intervene should be denied for the reason above indicated; the motion to dismiss should be sustained for the reason that action was not timely commenced, let an order be prepared, filed. Copies mailed by Clerk.

Feb. 17, 1953. Order dismissing suit at plaintiff's cost, entered in Civil Order Book 9, page 669, and filed.

Feb. 18, 1953. Notice of Appeal, filed.

Feb. 18, 1953. Cost Bond on Appeal, filed.

Mar. 13, 1953. Notice of Appeal of Newark Insurance Company, filed. Copies mailed by Clerk.

Mar. 13, 1953. Cost Bond on Appeal, filed. Copies mailed by Clerk.

Mar. 16, 1953. Order by agreement of parties the following exhibits are made a part of the record—1. Claim for compensation for injury dated 9-19-51; 2. Notice of demand for lump sum settlement dated 9-28-51; 3. Medical Report of Dr. Jack E. Maxfield dated 10-20-51; 4. Notice of Appeal dated 10-23-51; and 5. Copy of Senate Bill No. 237, Section 6A, entered in Civil Order Book 9, page 701, and filed.

COMPLAINT.

(Filed August 20, 1952.)

The plaintiff is a citizen and resident of the State of Texas and the defendants are citizens and residents of the State of Tennessee, doing business as the Benson Cable Scaffold Manufacturing Company, with offices located at 303 Cherokee Building, Knoxville, Tennessee.

II.

The plaintiff has been for many years a painter by trade and more recently an employee of the C. H. A. Paint Company. That on or about the 13th day of August, 1951, while engaged in the performance of his duties and painting the "Alamo" School in Wichita Falls, Wichita County, Texas, a scaffold made and/or manufactured by the defendants, then being used by the plaintiff, gave way by reason of its negligent or defective construction causing him to fall a great distance and suffer serious, disabling and permanent injuries. That it was by reason of the defendant's negligence that he was caused to suffer these injuries.

III.

That the plaintiff is approximately 40 years of age and is the sole support of his wife and seven small children, ranging in age from one to fifteen years, and that prior to his injury earned in excess of $100.00 each week. That he suffered a broken neck, a severe injury to his back, a severe injury to his right leg, a concussion of the brain and other wounds, bruises and contusions on and about the various parts of his head, arms, body and legs. That he was forced to wear a neck brace for a long period of time, that he suffered greatly in body and mind, received a severe shock to his nervous system, was caused to expend and become liable for large sums of money for hospital bills, doctor bills, nurses and other expenses necessary to his care and treatment, and lost large sums of money in wages that he otherwise would have earned. He further says that his injuries are so serious and of such a nature that he will never completely recover therefrom but will forever remain sick, sore, lame, disfigured, and disordered—all by reason of the defendant's negligence.

Wherefore, the plaintiff demands judgment against the defendants for the sum of One Hundred Thousand ($100,000.00) Dollars, interest and costs.

The plaintiff demands a jury to try this cause.

Attorneys for Plaintiff:
JOE VAN DERVEER,
1010 James Building,
Chattanooga, Tennessee,
PEERY & KURIO,
Nacol Building,
Wichita Falls, Texas.

MOTION TO DISMISS.

(Filed September 6, 1952.)

Come Howard R. Benson and Robert H. Benson, doing business as Benson Scaffold & Equipment Company, without questioning the improper name by which and in which they were sued, and move the Court, pursuant to Rule 12 (b) (6), to dismiss the summons and complaint upon the following ground, to-wit:

That the same show on their face that they were filed on August 20, 1952, in this Court, whereas the cause of action alleged accrued on the 13th day of August, 1951, and became barred by the one-year statute of limitations of the State of Tennessee on August 13, 1952.

Wherefore, these defendants pray the judgment of the Court whether they should further answer.

H. H. McCAMPBELL, JR.,
803 Burwell Building,
Knoxville, Tennessee,
Attorney for Howard R. Benson and Robert H. Benson, d. b. a. Benson Scaffold & Equipment Company.

MOTION OF NEWARK INSURANCE COMPANY TO INTERVENE AS PLAINTIFF.

(Filed November 24, 1952.)

Comes the Newark Insurance Company and moves for leave to intervene in this action as plaintiff upon the ground that on and prior to August 13, 1951, it was the Workmen's Compensation insurance carrier for the

C. H. A. Painting Company of Wichita Falls, Texas, and that as such insurance carrier it has heretofore paid compensation benefits as provided by the Workmen's Compensation Act of Texas to the plaintiff, A. F. Hutto; and that by virtue thereof and of the provisions of the Workmen's Compensation Act of Texas it is subrogated to the rights of the said A. F. Hutto, and that under the provisions of the Workmen's Compensation Act of Texas the representation of the interest of the said Newark Insurance Company by the said A. F. Hutto is or may be inadequate and the said Newark Insurance Company is or may be bound by a judgment in this action.

Copy of the proposed complaint setting forth the claim of the Newark Insurance Company is hereto attached.

ERMA G. GREENWOOD,
Attorney for Newark Insurance Company, Applicant for Intervention,
904 Burwell Building,
Knoxville, Tennessee.

INTERVENING COMPLAINT.

The intervenor above named, by leave of Court first had and obtained, files this its complaint of intervention, against the above named defendants, and says:

1. That it is a corporation organized and existing under the laws of the State of New Jersey and A. F. Hutto, the original plaintiff herein, is a citizen and resident of the State of Texas and the defendants are citizens and residents of the State of Tennessee.

2. That A. F. Hutto, the original plaintiff herein, filed a complaint herein on the 20th day of August, 1952, against Howard R. Benson and Robert H. Benson, d/b/a Benson

Cable Scaffold Manufacturing Company seeking to recover damages in the amount of One Hundred Thousand ($100,000.00) Dollars for personal injuries sustained by the original plaintiff on or about the 13th day of August, 1951, when a scaffold made or manufactured by the defendants and then being used by the plaintiff gave way by reason of its negligent or defective construction and caused plaintiff to fall a great distance, and to sustain injuries to his body of a serious and permanent nature.

3. Howard R. Benson and Robert H. Benson, d/b/a Benson Scaffold & Equipment Company named as defendants in the original complaint and therein said to be doing business as Benson Cable Scaffold Manufacturing Company, without questioning the improper name in which they were sued, moved the court pursuant to Rule 12 (b) (6) to dismiss the summons and complaint upon the ground that the same showed upon their face that they were filed on August 20, 1952, whereas the cause of action alleged was shown to have occurred on the 13th day of August, 1951, and became barred by the one-year statute of limitations of the State of Tennessee on August 13, 1952.

4. That on and prior to the 13th day of August, 1951, the original plaintiff, A. F. Hutto, was an employee of the C. H. A. Painting Company of Wichita Falls, Texas, and that on and prior to the said 13th day of August, 1951, the intervenor Newark Insurance Company was the Workmen's Compensation insurance carrier for the said C. H. A. Painting Company.

5. That the original plaintiff, A. F. Hutto, received the injuries complained of in the original complaint herein as the result of an accident which arose out of and in the scope of his employment by the C. H. A. Painting Company when a scaffold made and/or manufactured by the defendants, Howard R. Benson and Robert H. Benson, d/b/a Ben-

son Scaffold & Equipment Company, and which was being used by the plaintiff gave way.

6. That on or about September 13, 1951, the original plaintiff herein, A. F. Hutto, duly filed his claim for compensation for injury with the Industrial Accident Board of Texas under the style and number of **A. F. Hutto v. C. H. A. Painting Company,** No. K-45259.

7. That on or about November 23, 1951, and during the pendency of said claim before the Industrial Accident Board of Texas the parties entered into a compromise settlement agreement of said claim under the terms of which the Newark Insurance Company as Workmen's Compensation insurance carrier for C. H. A. Painting Company was to pay to said A. F. Hutto the sum of Four Thousand Five Hundred ($4,500.00) Dollars in addition to the sum of One Hundred Seventy-five ($175.00) Dollars which the said Newark Insurance Company had theretofore paid to the said A. F. Hutto, and in addition to medical expenses in the amount of Four Hundred Four and 65/100 ($404.65) Dollars incurred by or for the said A. F. Hutto as the result of the accidental injuries aforesaid. That on the 29th day of November, 1951, the Industrial Accident Board of Texas entered an order approving the compromise settlement agreement made by the parties.

8. That pursuant to said order this intervenor, Newark Insurance Company, on or about December 1, 1951, paid to the said A. F. Hutto the additional sum of Four Thousand Five Hundred ($4,500.00) Dollars, making in all the sum of Five Thousand Seventy-nine and 65/100 ($5,079.65) Dollars paid by this intervenor as compensation benefits and medical services to the said A. F. Hutto as a result of the accidental injuries received by the said Hutto at the time and place aforesaid.

Intervening Complaint

9. That under the provisions of the Workmen's Compensation Act of Texas the employee, having collected benefits from his employer or its insurer under the provisions of the Workmen's Compensation Act of Texas, may then proceed at law against a negligent third person to recover damages for the injuries sustained by him. However, under the provisions of the Workmen's Compensation Act of Texas in those instances in which the employee prosecutes an action against a negligent third person after having received compensation benefits from his employer or its insurer, such employee may not recover from such negligent third party the sums paid by the insurer or employer. However, an insurer which has paid compensation benefits to an injured employee is subrogated to the rights of such injured employee against a negligent third party to the extent of payments made, expenses incurred, etc., and may itself maintain an action against such negligent third party, or may intervene as a party plaintiff in such an action brought by the injured employee and may itself recover from the negligent third party such sums paid by it to the employee together with the reasonable costs of such liability as determined by the court trying the case.

10. That the sole and proximate cause of the injuries received by the original plaintiff, A. F. Hutto, on said 13th day of August, 1951, was the negligence of the defendants, Howard R. Benson and Robert H. Benson, d/b/a Benson Scaffold & Equipment Company, in manufacturing, assembling and/or marketing the scaffold containing defective materials imperfectly and improperly manufactured and assembled.

Wherefore, this intervenor demands judgment against the defendants for the sum of Five Thousand Seventy-nine and 65/100 ($5,079.65) Dollars with interest thereon together with the sum representing this intervenor's reason-

able cost of enforcing such liability and the costs of the cause, and prays that an answer be filed hereto both by A. F. Hutto, the original plaintiff herein, and by Howard R. Benson and Robert H. Benson, d/b/a Benson Scaffold & Equipment Company, the original defendants herein.

This 24th day of November, 1952.

ERMA G. GREENWOOD,
R. R. KRAMER,
Attorneys for Newark Insurance Company,
904 Burwell Building,
Knoxville, Tennessee.

MOTION TO AMEND COMPLAINT.

(Filed December 10, 1952.)

Plaintiff moves the Court, in conformity with Rule 15 (a) and in accordance with a motion, orally made before the Court on December 2, 1952, for leave to amend his complaint, heretofore filed, by adding thereto immediately following paragraph III, a new paragraph as follows:

IV.

That his injuries arose "out of" and "in the course of" his employment and by reason thereof he filed a claim with the Industrial Accident Board of the State of Texas for those benefits provided by the Workmen's Compensation Act of that State on September 13, 1951, his employer, the C. H. A. Paint Company, and their workmen's compensation insurance carrier, the Newark Insurance Company, being duly notified. The Industrial Accident Board of the State of Texas, duly charged with the administration of the Workmen's Compensation Act of that State,

determined that he was entitled to compensation, and accordingly made an award in an amount unsatisfactory to him. That thereafter he appealed the decision of the Industrial Accident Board to the U. S. District Court for the Northern District of Texas, Wichita Falls Division, and while his suit was pending therein entered into a compromise agreement under the terms of which the Newark Insurance Company, as the Workmen's Compensation insurance carrier for his employer, paid to him the sum of Forty-five Hundred ($4500.00) Dollars in addition to the sum of One Hundred Seventy-five ($175.00) Dollars which the Newark Insurance Company had theretofore paid him and in addition to medical expenses to that date incurred by him in the amount of Four Hundred Four ($404.64) and 64/100 Dollars. That on the 29th day of November, 1951, the Industrial Accident Board of the State of Texas entered an order approving the compromise settlement made by the parties.

And by adding thereto another new paragraph as follows:

V.

That under the provisions of the Workmen's Compensation Act of the State of Texas, the injured employee, having collected from his employer or its insurer those benefits provided by the Workmen's Compensation Act of the State of Texas, may then proceed at law against a negligent third party, or that party responsible for his injuries, and recover damages therefor. That the amount received by him under the provisions of the Workmen's Compensation Act of the State of Texas are hideously inadequate in view of the seriousness of his injuries and he therefore now brings this action.

JOE VAN DERVEER,
Attorney for Plaintiff.

MEMORANDUM OPINION OF TAYLOR, D. J.

(Filed February 3, 1953.)

Plaintiff, a painter, sustained injury by a fall from a scaffold. The accident occurred in Texas where plaintiff, proceeding under the Workmen's Compensation law of that State, received compensation benefits by way of a compromise settlement approved by the Texas compensation board. He thereafter brought this action at law in Tennessee to recover damages from defendant as to the third parties who allegedly caused his injuries by their sale of defective equipment. Newark Insurance Company, the employer's insurance carrier, has filed a motion for leave to intervene, claiming subrogation to the extent of the benefits awarded to the plaintiff. The plaintiff has also filed a motion for leave to amend the complaint, by which amendment he would make it appear that his present action is based upon a statutory right. A third motion is that of defendants to dismiss the action as barred by the Tennessee one-year statute of limitations, as provided in Code Sec. 8595.

As it originally stood, the complaint in terms stated a common law cause of action in tort, without any effort to assert a statutory right. The motion to dismiss followed the filing of this complaint. It is advisable to examine the status of the case at the time the motion was filed, for in the opinion of the court that status would not have been any different if the proposed amendment had been a part of the complaint as originally filed.

The accident occurred August 13, 1951. Summons in the present action was served on defendants August 20, 1952. The complaint was filed September 6, 1952. Both the complaint and summons bear effective dates subsequent to expiration of the Tennessee one-year period of limita-

tions. For a common law action for personal injury the Texas period of limitation is two years. The question is whether the Texas two-year period or the Tennessee one-year period is applicable. If the Texas law controls, commencement of the action was timely; otherwise, it is barred.

Following are pertinent sections from the **Restatement, Conflict of Laws:**

> Sec. 378. "The law of the place of wrong determines whether a person has sustained a legal injury."
>
> Sec. 585. "All matters of procedure are governed by the law of the forum."
>
> Sec. 603. "If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose."

The illustration given under Sec. 603 is as follows:

> "A is unlawfully beaten by B in state X. By the statute of limitations of X, an action for battery is barred after the expiration of two years. By the statute of limitations of Y, an action for battery is barred after the expiration of one year from the time B became suable in Y."

In a diversity of citizenship case, such as this, a Federal Court will apply the law of conflicts of the State in which the Federal Court sits. **Klaxon Co. v. Stentor Electric Mfg. Co.**, 313 U. S. 487; **Griffin v. McCoach**, 313 U. S. 498. Tennessee follows the rules stated in Secs. 585 and 603 of the **Restatement**, above quoted. **McKissick v. McKissick**, 25 Tenn. 75; **Lally v. Holland**, 31 Tenn. 396; **King v. Doolittle**, 38 Tenn. 77; **Estes v. Kyle**, 19 Tenn. 34; **Fitzsimmons v. Johnson**, 90 Tenn. 416; **Barbour v. Erwin**, 82 Tenn. 716; **Ridge v. Cowley**, 74 Tenn. 166. The Court of Appeals for the 6th Circuit has applied the law as above

stated in cases brought in the Federal courts. **Wilson v. Massengill,** 6 Cir., 124 F. 2d 666; **Maki v. George R. Cooke Co.,** 6 Cir., 124 F. 2d 663. See also **Goodwin v. Townsend,** 3 Cir., 197 F. 2d 970.

As an action at common law, under the **Restatement** rules and the decisions above cited, the action as originally commenced is barred. As heretofore indicated, the amendment to the complaint, if allowed, would not save the action.

The rules of the **Restatement,** quoted above, do not apply where the right sought to be asserted in the forum state is derived from a statute which provides its own period of limitation. **Wilson v. Massengill,** 6 Cir., 124 F. 2d 666. In such case the right created by statute and the period of its preservation comprise a unitary right in law, and the rule applicable is that set out in Sec. 378 of the **Restatement,** namely, "The law of the place of wrong determines whether a person has sustained a legal injury." If the cause of action is one unknown to the common law, the statute which fixes the period of its preservation is as much a part of the right as the cause of action itself, both being creatures of statute and bound together by the statute of their creation. The result is that the *lex loci,* and not the *lex fori,* controls. **Wilson v. Massengill,** supra. However, the limitation rule as to an action to assert a statutory right does not apply to the instant case for the reason, as will hereinafter be seen, that the cause of action asserted here is one at common law.

Where an employer is injured by a third party under circumstances which would give the injured party a common law action for damages, and the employer and employee operate under the workmen's compensation statute, the compensation statute of Texas accords the injured employee an option. He may proceed at common law

against the third party to recover damages for his injury, or he may sue for benefits under the compensation law. But he may not pursue both remedies concurrently. Nor may he recover from the third party his entire damages, unless he elects to proceed against the third party only. Where an employee first proceeds under the compensation law and thereunder recovers benefits, his recovery against the third party is limited to damages in excess of the compensation benefit.

Attention of the court in relation to the Texas compensation law has been called to Texas decisions which hold that the general statute of limitation in Texas does not run against the employee while his compensation suit is pending. **Fidelity Union Casualty Co. v. Texas Power & Light Co.**, 35 S. W. 2d 782; **Webster v. Isbell**, 71 S. W. 2d 342. If any Texas statute of limitations were applicable in the present action it would be the general two-year statute, for the compensation statute itself provides no period of limitation. The Texas compensation law does provide, however, that upon termination of the compensation suit, the obligor for payment of compensation benefits is subrogated to the rights of the employee against the third party to the extent of the compensation payment or award. It is further indicated by citation of Texas court decisions that the cause of action of such obligor is not independent and severable from that of the employee, but that the third party may be subjected to only the one action for damages. **Hartford Accident & Indemnity Co. v. Weeks Drug Store et al.**, 161 S. W. 2d 153.

Analysis of the Texas statute discloses that it creates a cause of action for compensation benefits. It does not create a common law cause of action against the third party. Its effect rather is to restrict as to amount and to postpone as to time the employee's common law action

against the third party. Accordingly, amendment of the complaint in the manner heretofore indicated as sought by plaintiff would not change the action here from being an action at common law. The common law action here is one not created by, but one restricted and postponed by, statute. It is conceivable that under this construction an action in this state might be postponed so long that a plaintiff would be barred from bringing a common law action because of undue prolongation of compensation proceedings in Texas, a result that does not affect the present case for the reason that plaintiff had more than eight months in which to commence the action here after conclusion of the compensation proceedings.

The result is that the plaintiff's suit is barred by the Tennessee one-year statute of limitations. Being barred, it is not one that admits of intervention. **Wright et al. v. The Praetorians et al.**, 63 F. Supp. 839; **Coffman et al. v. Southern Coal Co., Inc., et al.**, 52 F. Supp. 351. The motion to amend the complaint should be denied because the proposed amendment would not affect the outcome. The motion to intervene should be denied for the reason above indicated. The motion to dismiss should be sustained for the reason that the action was not timely commenced.

Let an appropriate order be prepared.

ROBT. L. TAYLOR,
Judge.

ORDER DISMISSING ACTION AT PLAINTIFF'S COSTS.

(Entered February 17, 1953.)

This cause came on to be heard at a former day upon the motion of the defendants to dismiss, the motion of the plaintiff to amend, and the motion of the Newark Insur-

ance Company for leave to intervene, all duty served and filed herein.

Briefs having been filed in support of said motions, and argument of counsel for the respective parties having been heard, the Court took the matter under consideration and filed a memorandum herein on February 3, 1953, sustaining the defendants' motion to dismiss and disallowing the respective motions to amend and to intervene.

It is accordingly ordered, adjudged and decreed that plaintiff's action be, and it is hereby dismissed at plaintiff's costs.

NOTICE OF APPEAL OF A. F. HUTTO.

(Filed February 18, 1953.)

Notice is hereby given that the plaintiff in the above styled case hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order sustaining the defendants' motion to dismiss and disallowing the plaintiff's motion to amend his complaint.

JOE VAN DERVEER,
Attorney for Plaintiff,
1010-11 James Building,
Chattanooga, Tennessee.

COST BOND OF A. F. HUTTO.

(Filed February 18, 1953.)

Know All Men by These Presents, That Joe Van Derveer and The Home Indemnity Company of New York, New York, are held and firmly bound unto Howard R. Benson and Robert Benson, d/b/a Benson Cable Scaffold Manufacturing Company, their executors, administrators, or as-

signs, in the sum of Two Hundred Fifty ($250.00) Dollars, lawful money of the United States of America, to be paid unto the said Howard R. Benson and Robert Benson, d/b/a Benson Cable Scaffold Manufacturing Company, their executors, administrators, or assigns, to which payment well and truly to be made, they do bind and oblige their heirs, executors, and administrators, jointly and severally by these presents.

Whereas, the above-named A. F. Hutto, a citizen of the state of Texas, has this day filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit in the case styled A. F. Hutto v. Howard R. Benson and Robert Benson, d/b/a Benson Cable Scaffold Manufacturing Company.

Now Therefore the Condition of This Obligation is such that if the above-named A. F. Hutto shall duly prosecute and perfect his appeal, and shall pay, on demand, all costs of the appeal that may be adjudged or awarded against A. F. Hutto, then this obligation shall be void, otherwise, the same shall be and remain in full force and effect.

JOE VAN DERVEER,
Attorney for Plaintiff,
1010-11 James Building,
Chattanooga, Tennessee.

THE HOME INDEMNITY COMPANY OF NEW YORK, NEW YORK,
by C. T. WITHROW,
Attorney in Fact.

NOTICE OF APPEAL OF NEWARK INSURANCE COMPANY.

(Filed March 13, 1953.)

Notice is hereby given that Newark Insurance Company hereby appeals to the United States Court of Appeals for the Sixth Circuit from that portion of the order entered in this action on the 17th day of February, 1953, refusing it permission to intervene in the captioned cause as a party plaintiff.

ERMA G. GREENWOOD,
R. R. KRAMER,
Attorneys for Newark Insurance Company,
904 Burwell Building,
Knoxville, Tennessee.

COST BOND OF NEWARK INSURANCE COMPANY.

(Filed March 13, 1953.)

Know All Men by These Presents that we, Newark Insurance Company, as principal, and Erma G. Greenwood, as surety, are held and firmly bound unto A. F. Hutto and Howard R. Benson and Robert H. Benson, d/b/a Benson Scaffold & Equipment Company, to be paid to the said A. F. Hutto, his successors and assigns, and/or Howard R. Benson and Robert H. Benson, d/b/a Benson Scaffold & Equipment Company, their successors and assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Whereas, on the 17th day of February, 1953, a final order was entered in the above entitled action denying the Newark Insurance Company the right to intervene and

the said Newark Insurance Company has duly filed a notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit.

Now, Therefore, the condition of this bond is that if the said Newark Insurance Company shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Court of Appeals may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

NEWARK INSURANCE COMPANY,
By ERMA G. GREENWOOD,
Attorney.
ERMA G. GREENWOOD.

ORDER MAKING CERTAIN EXHIBITS A PART OF THE RECORD.

(Filed March 13, 1953.)

By agreement of the parties, and the approval of the Court, the following exhibits are hereby made a part of the record in this cause:

1. Claim for compensation for injury filed by A. F. Hutto, claimant, with the Industrial Accident Board, State of Texas, dated September 19, 1951.

2. Notice by A. F. Hutto, claimant, of demand for lump sum settlement of compensation claim filed with the Industrial Accident Board, State of Texas, on September 28, 1951.

3. Medical report of Dr. Jack E. Maxfield, dated October 20, 1951, filed with the Industrial Accident Board of the State of Texas.

4. Notice of appeal to a Court of Competent Jurisdiction by A. F. Hutto, Claimant, filed with the Industrial Accident Board, State of Texas, dated October 23, 1951.

5. Copy of Senate Bill No. 237, Section 6-A, as passed by the Thirty-fifth Legislature of the State of Texas, commonly referred to as the "Third Party Action" Statute.

ROBT. L. TAYLOR,
Judge.

CLAIM FOR COMPENSATION FOR INJURY FILED BY A. F. HUTTO, CLAIMANT, WITH THE INDUSTRIAL ACCIDENT BOARD, STATE OF TEXAS, DATED SEPTEMBER 19, 1951.

(Received Sept. 19, 1951.)

Form No. 2

Order from The Stock Co.,
Austin, Texas.

INDUSTRIAL ACCIDENT BOARD,
Austin, Texas.

Claim for Compensation for Injury.

Important—(This claim must be made out in duplicate and each question carefully and correctly answered within Six Months following infliction of injury, one copy to be mailed or delivered to your Employer or his or its Insurance Carrier, and one copy to the Industrial Accident Board at Austin, Texas.)

This is to notify you C. H. A. Paint Company and the
(Name of Employer or Insurance Carrier)
Newark Insurance Co. that I, A. F. Hutto, Social Security
(Print name here)

Claim for Compensation for Injury by A. F. Hutto, Etc.

No. ..... claim compensation under the Employers' Liability Act for personal injury suffered while in the course of my employment for C. H. A. Paint Company at
(Be careful to give correct name of employer)
Wichita Falls, Texas. The time of my injury was .....
(City or town) (Hour)
o'clock ..... on the 13th day of August, 1951.
(a. m. or p. m.) (Month)

The place of injury was Alamo School, Wichita Falls, Texas.
(Give exact location or name of place where injury occurred)

Cause of injury. Swinging Stage (Scaffold) Fell and I Fell.
(State exactly how injury occurred)

State part of body injured and nature and extent of injury Broken Neck, Back Injured, Brain Concussion, Right Leg, Other Cuts, Bruises and Lacerations.
(Describe injury with as much exactness as possible)

Did injury result in loss by amputation of a member or part of member? No. If so, name member and describe
(Yes or no)
exact point of amputation .....

My rate of pay on date of injury was $149.00 per week.
(Hour, day week or month)

Hours worked per day..... Days worked per week.....
(Number) (Number)

Length of time regularly employed in same employment for this employer previous to this injury. Approximately 7½ months.
(Years, month or days)

Give names and post office addresses of all witnesses in support of this claim for compensation.....
.....

Claim for Compensation for Injury by A. F. Hutto, Jr.

Were you furnished medical attention when injured? Yes.
If so, give name and address of doctor Dr. Harry Ledbetter,
(Name of doctor)
Medical & Surgical Clinic, Wichita Falls, Texas.
(City or town)

A. F. HUTTO,

By KEARBY PEERY, Atty.

.....
(Signature injured employee)

.....
(Street and number or R. F. D.)

....., Texas.
(City or town)

Witness to Signature
PEERY & KOURI,
500 Nacol Bldg.
(Signature of witness)
Wichita Falls, Texas.
(Address of witness)

In giving your address, be careful to give permanent or mail address so you will receive all your mail.

Dated this 13th day of September, 1951.

Attention: Carefully Read Letter of Instructions Before Filling Out Your Claim for Compensation for Injury.

Note—Part II. Employers' Liability Act. Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this Act shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty (30) days after the happening thereof, and unless a claim for

compensation with respect to such injury shall have been made within six (6) months after the occurrence of the same, or in case of death of the employe or in the event of his physical or mental incapacity within six (6) months after the death or the removal of such physical or mental incapacity. Provided, that for good cause the Board may in meritorious cases waive the strict compliance with the foregoing limitations as to notice and the filing of the claim before the Board.

NOTICE BY A. F. HUTTO, CLAIMANT, OF DEMAND FOR LUMP SUM SETTLEMENT OF COMPENSATION CLAIM FILED WITH THE INDUSTRIAL ACCIDENT BOARD, STATE OF TEXAS, ON SEPTEMBER 28, 1951.

(Received Sept. 28, 1951.)

The State of Texas }
County of Wichita }

To the Industrial Accident Board, Austin, Texas:

The undersigned, A. F. Hutto, says that on the 13th day of August, 1951, while in the employ of C. H. A. Paint Company, he fell off of a scaffold for a distance of approximately thirty feet with the result that he broke his neck, injured his back and right leg, suffering a brain concussion, and that he is totally and permanently disabled.

That the week before his injury he earned approximately $149.00 in the course of his employment. That he has a wife and seven children and has no means of support other than what compensation is paid him. That the payment of $25.00 per week is wholly inadequate for him to support his wife and children with even the bare necessities of life. Hence, the failure to pay him his compensation in a lump sum will result in a manifest hardship and injustice to him.

A. F. Hutto further says that his employer and the Newark Fire Insurance Company had notice of his injury and his condition prior to the 13th of September, 1951, and have had an adequate time to investigate the matter, and that three weeks would be a reasonable additional time for the Newark Fire Insurance Company to procure any evidence in opposition to his claim for a lump sum. Hence, A. F. Hutto makes a demand upon the Industrial Accident Board to set his case for a hearing on the merits, or in the alternative on the question of lump sum, or on both, within twenty-one days from this date.

A. F. HUTTO.

Subscribed and sworn to before me, the undersigned authority, this the 26th day of September, 1951.

KEARBY PEERY,
Notary Public in and for
Wichita County, Texas.

MEDICAL REPORT OF DR. JACK E. MAXFIELD, DATED OCTOBER 20, 1951, FILED WITH THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF TEXAS.

Wichita Falls Clinic Hospital
Wichita Falls, Texas
October 20, 1951

Insurance Adjustment Service
1904 W. T. Waggoner Building
Ft. Worth, Texas

Re: A. F. Hutto vs.
C. H. A. Painting Company.

Gentlemen:

Mr. A. F. Hutto reported to this office on October 26, 1951 for consultation at the request of Dr. Harry Ledbetter

relative to an injury which the patient allegedly sustained on August 13, 1951 in a thirty foot fall from a scaffold. The patient states that in that fall he lacerated the right leg and right ear, bruised his forehead, and injured his neck and upper back. The patient has been under the care of Dr. Ledbetter who sutured the wounds on the leg and ear, and placed the patient in head traction for a period of eight days in the hospital. Traction was then replaced by a brace which the patient has been wearing since that time. On this occasion the patient states that his leg and ear are giving him no serious trouble. He had a bruise across the lower part of the dorsal back, but that it now gives no pain and only occasional sensation of tiredness. About one week ago Dr. Ledbetter asked the patient to begin to remove the cervical brace on occasions each day to get used to going about without it. The patient states that when he does this he gets severe headaches which are relieved only by reapplication of the brace.

Examination of the patient's neck shows that he holds it quite rigidly and is very hesitant about moving it in any direction. There is no associated muscle spasm in the neck, however, and we get the impression that the patient's failure to move the neck in the various directions is assimilated chiefly by fear. There is some aparent tenderness to palpation over the lower cervical spine and upper thoracic spine. X-rays of the neck were taken which show evidence of a mild compression fracture of the fifth cervical vertebra, and a moderate compression of the sixth cervical vertebra. The disk space between the sixth and seventh cervical vertebra is narrowed. There is no subluxation or dislocation of any part of the spine, and it appears that the spine is stable in its present position.

It is my feeling that there is nothing to be gained by further immobilization of the neck at this time, and that

the patient must be encouraged to continue active exercise and use of the neck without support. It is my feeling that permanent disability from this injury will be rather mild and manifested only by slight restriction of neck motion. I feel that the headache which occurs after removal of the brace at this time is a tension type of headache promoted by fear and nervous tension incident to removal of the brace.

Sincerely yours,

JACK E. MAXFIELD, M. D.,
Orthopedic Surgeon.

NOTICE OF APPEAL TO A COURT OF COMPETENT JURISDICTION BY A. F. HUTTO, CLAIMANT, FILED WITH THE INDUSTRIAL ACCIDENT BOARD, STATE OF TEXAS, DATED OCTOBER 23, 1951.

(Received Oct. 23, 1951.)

Wichita Falls, Texas,
October 22, 1951.

Industrial Accident Board,
Land Office Building,
Austin, Texas.

Re: No. K-45259
A. F. Hutto vs. C. H. A. Paint Company
Newark Fire Insurance Co., Insurer

Gentlemen:

This is to advise you that the claimant will not abide by the final decision and award of the Industrial Accident Board in the above entitled and numbered cause wherein the Board refused to set the above case on its merits or on the question of lump sum as demanded in the affidavit of

A. F. Hutto on file in the above cause. That within twenty days from this date the said claimant, A. F. Hutto, will file a suit in a court of competent jurisdiction to set aside said award and to review the Board's action in refusing to set this case within a reasonable time on its merits or on the question of lump sum.

A. F. HUTTO,
By KEARBY PEERY, Attorney,
500 Nacol Building,
Wichita Falls, Texas.

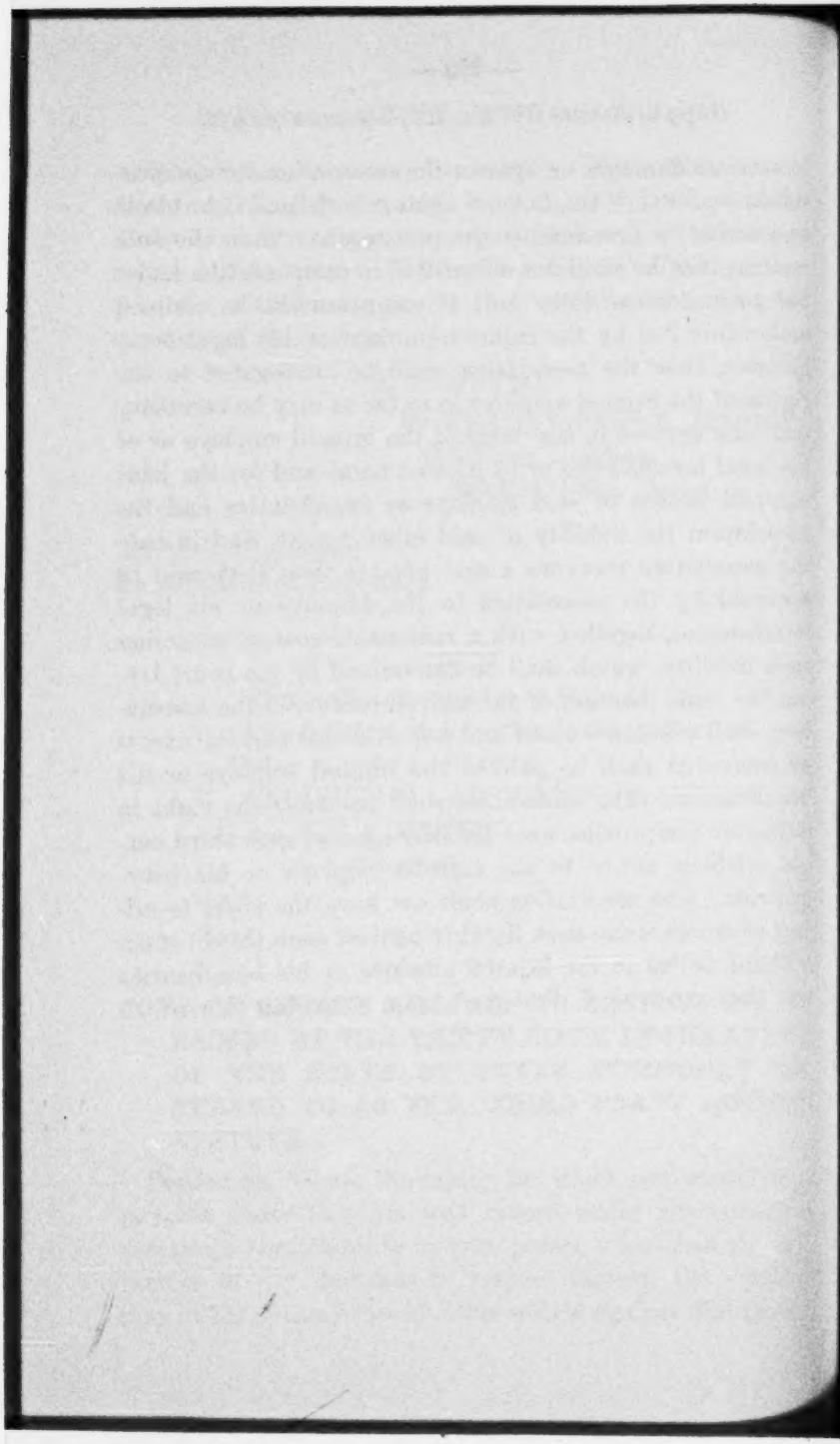
Air Mail, Registered
Return Receipt Requested

This will acknowledge receipt in this office of Notice of Intention to Appeal on 23 day of Oct., A. D. 1951.
INDUSTRIAL ACCIDENT BOARD
LELA MARTIN
Secretary

COPY OF SENATE BILL NO. 237, SECTION 6-A, AS PASSED BY THE THIRTY-FIFTH LEGISLATURE OF THE STATE OF TEXAS, COMMONLY REFERRED TO AS THE "THIRD PARTY ACTION" STATUTE.

Section 6a. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employe may at his option proceed either at law against that person

to recover damages or against the association for compensation under this Act, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under the provisions of this Act; if compensation be claimed under this Act by the injured employe or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employe in so far as may be necessary and may enforce in the name of the injured employe or of his legal beneficiaries or in its own name and for the joint use and benefit of said employe or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employe or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employe or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employe or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employe or his beneficiaries and the approval of the board, upon a hearing thereof.



PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSES ARGUED AND SUBMITTED.

(February 8, 1954—Before Simons, Allen, and Miller, JJ.)

These causes are argued by Jesse C. Parks, Jr., for A. F. Hutto, by Erma Greenwood for Newark Insurance Company, and by H. H. McCampbell, Jr., for Howard R. Benson, et al., and are submitted to the court.

JUDGMENT.

No. 11,873.

(Filed April 30, 1954.)

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for proceedings in accordance with the opinion herein.

JUDGMENT.

No. 11,874.

(Filed April 30, 1954.)

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for proceedings in accordance with the opinion herein.

OPINION.

(Filed April 30, 1954.)

Nos. 11873, 11874.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

A. F. Hutto, Appellant, v. Howard R. Benson and Robert H. Benson, d/b/a Benson Cable Scaffold Manufacturing Company, Appellees.	No. 11873.
Newark Insurance Company, Appellant, v. Howard R. Benson and Robert H. Benson, d/b/a Benson Scaffold & Equipment Company, Appellees.	No. 11874.

Appeal from the District Court of the United States, Eastern District of Tennessee, Northern Division.
Decided April 30, 1954.

Simons, Chief Judge, Allen and Miller, Circuit Judges.

Allen, Circuit Judge. These two appeals, one instituted by the appellant Hutto, hereinafter called Hutto, in a per-

sonal injury action, and the other by the appellant Newark Insurance Company, hereinafter called Newark, insurer under the Workmen's Compensation Act of Texas, involve the same transactions and were consolidated for argument and decision. Each attacks a judgment of the District Court which dismissed an action against a third party resident in the State of Tennesssee upon the ground that the Tennessee statute of limitations had run. This statute provides a limitation of one year for personal injury cases, while the Texas period of limitation in such cases is two years.

On August 20, 1952, Hutto filed a complaint against the appellees, residents of the State of Tennessee, in the District Court for the Eastern District of Tennessee. Hutto alleged that he was a painter by trade and that on or about the 13th day of August, 1951, while he was engaged in the performance of his duties in Wichita Falls, Wichita County, Texas, a scaffold made or manufactured by the appellees and then being used by Hutto, gave way by reason of negligent or defective construction, causing Hutto to fall and suffer serious injuries. Later Hutto prayed for leave to amend his complaint by adding two new paragraphs which read as follows:

> "That his injuries arose 'out of' and 'in the course of' his employment and by reason thereof he filed a claim with the Industrial Accident Board of the State of Texas for those benefits provided by the Workmen's Compensation Act of that State on September 13, 1951, his employer, the C. H. A. Paint Company, and their workmen's compensation insurance carrier, the Newark Insurance Company, being duly notified. The Industrial Accident Board of the State of Texas, duly charged with the administration of the Workmen's Compensation Act of that State, determined that he was entitled to compensation, and accordingly made an award in an amount unsatisfactory to him.

That thereafter he appealed the decision of the Industrial Accident Board to the U. S. District Court for the Northern District of Texas, Wichita Falls Division, and while his suit was pending therein entered into a compromise agreement under the terms of which the Newark Insurance Company, as the Workmen's Compensation Insurance carrier for his employer, paid to him the sum of Forty-five Hundred ($4,500.00) Dollars in addition to the sum of One Hundred Seventy-five ($175.00) Dollars which the Newark Insurance Company had theretofore paid him and in addition to medical expenses to that date incurred by him in the amount of Four Hundred Four ($404.64) and 64/100 Dollars. That on the 29th day of November, 1951, the Industrial Accident Board of the State of Texas entered an order approving the compromise settlement made by the parties.

"That under the provisions of the Workmen's Compensation Act of the State of Texas, the injured employee, having collected from his employer or its insurer those benefits provided by the Workmen's Compensation Act of the State of Texas, may then proceed at law against a negligent third party, or that party responsible for his injuries, and recover damages therefor. That the amount received by him under the provisions of the Workmen's Compensation Act of the State of Texas are hideously inadequate in view of the seriousness of his injuries and he therefore now brings this action."

Appellant Newark filed a motion to intervene as plaintiff and tendered a complaint which, in addition to the facts set forth in Hutto's complaint, reads as follows:

"6. That on or about September 13, 1951, the original plaintiff herein, A. F. Hutto, duly filed his claim for compensation for injury with the Industrial Accident Board of Texas under the style and number

of **A. F. Hutto v. C. H. A. Painting Company**, No. K-45259.

"7. That on or about November 23, 1951, and during the pendency of said claim before the Industrial Accident Board of Texas the parties entered into a compromise settlement agreement of said claim under the terms of which the Newark Insurance Company as Workmen's Compensation insurance carrier for C. H. A. Painting Company was to pay to said A. F. Hutto the sum of Four Thousand Five Hundred ($4,500.00) Dollars in addition to the sum of One Hundred Seventy-five ($175.00) Dollars which the said Newark Insurance Company had theretofore paid to the said A. F. Hutto, and in addition to medical expenses in the amount of Four Hundred Four and 65/100 ($404.65) Dollars incurred by or for the said A. F. Hutto as the result of the accidental injuries aforesaid. That on the 29th day of November, 1951, the Industrial Accident Board of Texas entered an order approving the compromise settlement agreement made by the parties.

"8. That pursuant to said order this intervenor, Newark Insurance Company, on or about December 1, 1951, paid to the said A. F. Hutto the additional sum of Four Thousand Five Hundred ($4,500.00) Dollars, making in all the sum of Five Thousand Seventy-nine and 65/100 ($5,079.65) Dollars paid by this intervenor as compensation benefits and medical services to the said A. F. Hutto as a result of the accidental injuries received by the said Hutto at the time and place aforesaid.

"9. That under the provisions of the Workmen's Compensation Act of Texas the employee, having collected benefits from his employer or its insurer under the provisions of the Workmen's Compensation Act of Texas, may then proceed at law against a

negligent third person to recover damages for the injuries sustained by him. However, under the provisions of the Workmen's Compensation Act of Texas in those instances in which the employee prosecutes an action against a negligent third person after having received compensation benefits from his employer or its insurer, such employee may not recover from such negligent third party the sums paid by the insurer or employer. However, an insurer which has paid compensation benefits to an injured employee is subrogated to the rights of such injured employee against a negligent third party to the extent of payments made, expenses incurred, etc., and may itself maintain an action against such negligent third party, or may intervene as a party plaintiff in such an action brought by the injured employee and may itself recover from the negligent third party such sums paid by it to the employee together with the reasonable costs of such liability as determined by the court trying the case."

Newark demanded judgment for the sum of $5,079.65 with interest, together with the reasonable cost of enforcing the liability and the costs of the action. The District Court considered that the action was barred by the statute of limitations of Tennessee and therefore refused to permit Hutto's amended complaint and Newark's intervening complaint to be filed.

Appellant contends that this holding runs counter to the decisions of this court in **Wilson v. Massengill**, 124 Fed. (2d) 666, and **Maki v. George R. Cooke Co.**, 124 Fed. (2d) 663. In these cases our court applied the doctrine that, where by statute a state creates a cause of action for wrongful death and prescribes in the same statute a limitation period for such action, such limitation will be applied in the forum of a sister state, although the period of limitation for a like action in the latter state is

shorter. See also **Theroux v. Northern Pacific R. Co.**, 64 Fed. 84; **Lewis v. Reconstruction Finance Corporation**, 177 Fed. (2d) 654 (C. A. D. C.).

This contention cannot be sustained, for the premise upon which the cited cases were based is absent here. No limitation period is prescribed in the Workmen's Compensation Act of Texas. The applicable provision is part of the general Texas statute of limitations. Moreover, the Supreme Court of the United States in the case of **Wells v. Simonds Abrasive Co.**, 345 U. S. 514, has recently cast doubt upon the doctrine of **Wilson v. Massengill**, supra. In that case the alleged wrongful death occurred in Alabama and the action was instituted in Pennsylvania. The statute creating the cause of action for wrongful death in Alabama prescribed a limitation of two years, while the period set in the Pennsylvania general statute of limitations provided one year. Although the Alabama statute construed embodied a limitation provision, the Pennsylvania District Court and the Court of Appeals applied the one-year limitation and the Supreme Court of the United States affirmed the judgment, holding that it did not violate the Full Faith and Credit Clause of the Constitution.

However, on another point the majority of the court thinks appellants' contentions are more tenable. The precise provision of the Workmen's Compensation Act of Texas compelled Hutto first to aply for compensation to the Industrial Accident Board of Texas before bringing action against the third party alleged tort-feasor. Under this statute as construed by the Texas courts the right of the employee to sue the third party does not accrue until the insurer under the Workmen's Compensation Act has assumed liability for compensation or has paid such compensation. **Buss v. Robison**, 255 S. W. (2d) 339. A compromise settlement between the parties herein was finally approved by the Industrial Accident Board of Texas on

November 29, 1951. Hutto could not maintain the instant case until November 29, 1951, without being penalized by losing his action for workmen's compensation. The Tennessee statute of limitations, Section 8595, Code of Tennessee, provides that actions "for injuries to the person" must be brought "within one year after cause of action accrued." If Hutto's action against the third party did not accrue until November 29, 1951, the complaint filed in Tennessee August 20, 1952, was timely brought. In Tennessee the statute of limitations runs only after the accrual of a complete right of action. **Reynolds Tobacco Co. v. Carson,** 187 Tenn. 157. The complete cause of action here would certainly comprehend the right to sue the third party tort-feasor. The controlling question, therefore, is when the action against the appellees accrued.

The District Court relied upon the Restatement of Law, Conflict of Laws, Sections 585 and 603, which provide that all matters of procedure are governed by the law of the forum, and that if action is barred by the statute of limitations of the forum no action can be maintained, though action is not barred in the state where the cause of action arose. But the Tennessee statute comes into force when the action accrues and the question when the action accrues is settled by the Texas decisions.

We think the Texas legislature by its treatment of the action against the third party tort-feasor qualifying and abridging the right made it part of the local law. In recognition of the fact that Hutto is drastically penalized for bringing his third party action before pursuing his workmen's compensation claim, the Texas courts hold that the right to sue the third party tort-feasor accrues after settlement of the workmen's compensation claim. Thus **Fidelity Union Casualty Co. v. Texas Power and Light Co.,** 35 S. W. (2d) 782, held that no cause of action accrued on the respective claims (of the insurer and the injured

employee) "until the final judgment of this court, when the facts necessary to give the casualty company and Riley [the injured plaintiff] an enforceable right, was given the judicial determination contemplated by said statute." While **Webster v. Isbell**, 71 S. W. (2d) 342, held that the running of the statute of limitations was suspended in a workmen's compensation case until the Industrial Accident Board finally acted upon and approved the claim, the holding in the controlling cases is that the action does not accrue until compensation is either paid or assumed by the insurance company. This was the rule laid down in **Buss v. Robison**, supra, decided in 1952. In that case the court cited the Texas authorities, pointed out that some of them had been unconditionally approved by the Supreme Court of Texas, and specifically held that the claim of the wife of the decedent employee suing individually and as next friend of her minor children, and for the use and benefit of the insurance company and of the father and mother of the decedent employee, did not accrue until the insurance company assumed liability.

In view of the Texas decisions we think no question of conflict between the Tennessee and the Texas statute exists.

Since the action did not accrue until after the settlement of the compensation claim it is timely brought, whether the one-year statute of Tennessee or the two-year statute of Texas is applied.

The conclusion of the majority of the court that the action was timely brought requires that the District Court's denial of the motions to amend and to intervene be reversed.

The judgment is reversed and the case is remanded to the District Court for proceedings in accordance with this opinion.

Simons, Chief Judge, dissenting. Basically, the question here presented is the Conflict of Law Rule of the State of Tennessee. That state in Section 8595 of its Code provides that actions for injuries to the person must be brought within one year after the cause of action accrued and under Tennessee law an action accrues when injury is suffered. Texas has a general two-year statutes of limitations but, by a provision in its Workmen's Compensation Act, a plaintiff seeking recovery against a third party tort-feasor must first resort to his remedy under that act and may not sue the third party until such proceedings are concluded and compensation paid or assumed. The Texas Court of Civil Appeals in **Buss v. Robison,** 255 S. W. (2d) 339, held that a claim for damages does not accrue until this condition has been satisfied. The cases on which it relies refer to the provision as a suspension of the statute of limitations.

The question whether in diversity cases the federal courts must follow conflict of law rules prevailing in the states in which they sit, which was left open in **Ruhlin v New York Life Insurance Company,** 304 U. S. 202, was finally answered in **Klaxon Company v. Stentor Company,** 313 U. S. 487, where it was held that the prohibition declared in **Erie R. R. Co. v. Tompkins,** 304 U. S. 64, against independent determination by the federal court extends to the field of conflict of law. The court said: "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. (See **Erie R. R. Co. v Tompkins,** supra, at pp. 74-77). Any other ruling would do violence to the principle of uniformity within a state upon which the **Tompkins** decision is based. Whatever lack of uniformity this may produce between federal

courts in different states is attributable to our federal system, which leaves to a state within the limits permitted by the Constitution the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies. . . ." In **Wells v. Simonds Abrasive Company**, 345 U. S. 514, the question was by grant of certiorari limited to whether the Pennsylvania Conflicts Rule violated the Full Faith and Credit Clause of the Federal Constitution and it was said that the states are free to adopt such rules of conflict of laws as they choose and that applying the statute of limitations of the forum to a foreign substantive right did not deny full faith and credit.

My view is that while Texas may deny access to its courts to those who failed to comply with the condition of its Workmen's Compensation Act, it has no power to suspend or toll the Tennessee statute of limitations. **Doncher v. Marlin Firearms Company**, 198 Fed. (2d) 821 (2 Cir.), **Cauley v. S. E. Massengill Company**, 35 Fed. Supp. 371, D. C. Tenn. In the latter case, it was said: "Statutes of limitations being designed according to the sound policy of each state for itself to put at rest litigation after the lapse of certain varying periods of time, cannot be extended by the legislatures of foreign states, . . ." Our decisions in **Wilson v. Massengill**, supra, and **Maki v. Cooke**, supra, referred to in the majority opinion, reached a different result but, as that opinion demonstrates, they are no longer sound authority in the light of the **Wells** case, supra.

I think the judgment of the District Court should be affirmed.